Lee Hock Lai v Yeoh Wah Pein

HIGH COURT (ALOR SETAR) — CIVIL APPEAL NO 12-04 OF 1998
MOHD HISHAMUDIN J
12 NOVEMBER 1998

***Tort** — Negligence — Contributory negligence — Conflicting versions of facts given — Both parties claimed that the other encroached into his lane — Judge found both parties equally liable — Judge's approach was fundamentally wrong*

This was an appeal by the defendant/appellant against the decision of the sessions court judge who gave judgment in favour of the plaintiff/respondent and awarded damages against him for negligence in a running down case. In her judgment, the learned sessions court judge found both parties equally 'liable' and apportioned liability between them in the ratio of 50:50. The defendant appealed against both liability and the quantum of damages awarded. In this appeal, the High Court scrutinized the grounds of judgment of the sessions court judge as the approach she had used to deal with this case was fundamentally wrong. There were also two conflicting versions of finding of fact in which in her judgment, the sessions court judge said that glass fragments or splinters were slightly more on the defendant's side whereas the evidence, ie the sketch plan supported by the investigating officer's evidence, clearly indicated that the glass fragments or splinters were found scattered very much more on the defendant's lane as compared to the plaintiff's lane.

Held, allowing the appeal on liability with costs:

(1) The sessions court judge was fundamentally wrong in her approach. The case she was dealing with — a normal road accident case — essentially concerned the tort of negligence. The proper manner of approaching the case, as with all cases of similar nature, was for the court to evaluate the whole evidence and to make a finding of mixed law and fact as to whether or not the defendant was liable in negligence (see p 175F–G).

(2) Applying the test enunciated in *Lee Ewe Teik v Ariffin bin Hussain* [1990] 2 CLJ 191 and examining the sketch plan, the glass splinters or fragments were found scattered very much more on the defendant's side of the road. The glass splinters or fragments were found not even near the middle/dividing line but more on the middle part of the defendant's lane. This being the case, the court was unable to accept the plaintiff's contention that the accident occurred on his side of the road, or that the defendant had encroached into his lane. The position of the glass splinters of fragments showed that, on a balance of probabilities, the collision took place on the defendant's side of the road (see p 178G–I).

(3) Throughout, the burden was on the plaintiff to prove negligence on the part of the defendant, on a balance of probabilities. Upon considering the evidence in its totality, the court found that the plaintiff had failed to discharge that burden (see p 179A).

A [**Bahasa Malaysia summary**

Ini merupakan suatu rayuan oleh defendan/perayu terhadap keputusan hakim mahkamah sesyen yang memberikan penghakiman memihak kepada plaintif/penentang dan mengawardkan ganti rugi terhadapnya untuk kecuaian dalam kes kemalangan. Dalam B penghakimannya, hakim mahkamah sesyen yang arif telah mendapati kedua-dua pihak 'dipertanggungjawabkan' sama rata dan mengagihkan liabiliti di antara mereka dalam kadar 50:50. Defendan telah merayu terhadap kedua-dua liabiliti dan kuantum ganti rugi yang diawardkan. Dalam rayuan ini, Mahkamah Tinggi telah meneliti alasan penghakiman hakim mahkamah sesyen kerana pendekatan C yang digunakannya dalammenguruskan kes ini adalah salah dari segi dasarnya. Terdapat juga dua versi keputusan fakta yang bercanggahan yang mana dalam penghakimannya, hakim mahkamah sesyen telah mengatakan bahawa serpihan kaca lebih sedikit di bahagian defendan manakala keterangan, iaitu pelan lakar disokong oleh keterangan D pegawai siasatan, jelas menunjukkan bahawa serpihan kaca didapati lebih bertaburan di atas jalan laluan defendan berbanding dengan jalan laluan plaintif.

Diputuskan, membenarkan rayuan atas liabiliti dengan kos:

E (1) Hakim mahkamah sesyen adalah salah dari segi dasar dalam pendekatannya. Kes yang diuruskannya — kes kemalangan jalan raya yang biasa — pada dasarnya adalah berkaitan dengan tort kecuaian. Cara yang betul dalam mendekati kes, sebagaimana dengan kes-kes yang sifatnya adalah serupa, adalah untuk mahkamah membuat penilaian keseluruhan keterangan dan F untuk membuat keputusan undang-undang dan fakta mengenai sama ada atau tidak defendan bertanggungjawab atas kecuaian (lihat ms 175F–G).

(2) Dengan memakai ujian yang dinyatakan dalam *Lee Ewe Teik v Ariffin bin Hussain* [1990] 2 CLJ 191 dan memeriksa pelan lakar, G kaca didapati bertaburan lebih sedikit di bahagian jalan defendan. Serpihan kaca tidak pun didapati berhampiran bahagian garis tengah/pembahagi tetapi lebih sedikit di bahagian tengah jalan laluan defendan. Oleh yang demikian, mahkamah tidak dapat menerima hujah plaintif bahawa kemalangan telah berlaku di bahagian jalannya, atau pun defendan telah masuk ke dalam H laluan jalannya. Kedudukan serpihan kaca menunjukkan bahawa atas imbangan kebarangkalian, pelanggaran berlaku di bahagian jalan laluan defendan (lihat ms 178G–I).

(3) Sepanjang masa, beban terletak pada plaintif untuk membuktikan kecuaian pada pihak defendant, atas imbangan kebarangkalian. I Setelah mempertimbangkan keterangan secara keseluruhan, mahkamah mendapati bahawa plaintif telah gagal melepaskan beban tersebut (lihat ms 179A).]

Notes

For cases on contributory negligence, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 445–475.

Cases referred to

Kek Kee Leng v Teresa Bong Nguk Chin & Anor [1978] 1 MLJ 61 (refd)
Lee Ewe Teik v Ariffin bin Hussain [1990] 2 CLJ 191 (folld)

Legislation referred to

Road Transport Act 1987

Appeal from: Civil Action No 53–556 of 1995 (Sessions Court, Alor Setar)

Desaradharaj (*VP Nathan & Partners*) for the appellant.
Brijnandan Singh (*Brijnandan Singh Bhar & Co*) for the respondent.

Cur Adv Vult

Mohd Hishamudin J: This is an appeal against the decision of the learned Alor Setar Sessions Court judge made on 24 December 1997.

Before the sessions court, the appellant was the defendant, while the respondent was the plaintiff. It was a running down case involving a collision between the plaintiff's motor cycle and the defendant's car; and the plaintiff, who had suffered personal injuries, sued the defendant for negligence.

The learned sessions court judge gave judgment in favour of the respondent/plaintiff and awarded damages.

At the outset, I wish to make the following observation.

The learned sessions court judge found both parties 'equally liable' in the following terms. In para 2 of the grounds of judgment, she said:

> Selepas perbicaraan ditamat, mahkamah memutuskan liabiliti atas kadar 50% plaintif dan 50% defendan.

Later, at the end of para 3 of her grounds of judgment, again she held:

> Secara simpulan atas isu liabiliti, mahkamah dapati kedua plaintif dan defendan harus dipertanggungjawabkan sama rata atas kemalangan ini.

My understanding of the above statements of the learned sessions court judge is that she held both parties 'equally responsible' ('dipertanggungjawabkan sama rata') and hence, she apportioned liability between the parties in the ratio of 50:50.

With respect, it is not clear to me what 'equally responsible' means. I have scrutinized the grounds of judgment and I found that apart from the statement therein:

> Dari sini, mahkamah dapati pihak defendan juga adalah *cuai* kerana gagal mengadakan perhatian yang cukup atas jalan di depannya. (Emphasis added.)

there was no clear and unequivocal finding that the defendant was guilty of negligence. Also, there was nothing said about any finding of contributory negligence on the part of the plaintiff. In fact (except in the above-quoted single instance where the word 'cuai' was used — and I shall say more of this shortly), nowhere in the grounds of judgment was the word 'kecuaian' (the Bahasa Malaysia term for negligence) or the words 'kecuaian sertaan' (the Bahasa Malaysia term for contributory negligence) used.

However, as I have pointed out, somewhere in the middle of para 3 of the grounds of judgment, she did mention the word 'cuai' in the following context:

> Dari sini, mahkamah dapati pihak *defendan juga* adalah *cuai* kerana gagal mengadakan perhatian yang cukup atas jalan di depannya. (Emphasis added.)

With respect, assuming that the word 'cuai' here is used to indicate negligence on the part of the defendant, then this statement reflects a rather novel approach. The use of the word 'juga' (in English it means 'also') in relation to the *defendant* implies that the learned sessions court judge had already made an *earlier* finding that the *plaintiff* was guilty of negligence. For, if this was not the case, then why did she use the word 'juga'? In other words, she subsequently found *both* the plaintiff and the defendant guilty of negligence; but that as between the two parties — the party suing and the party being sued — the sessions court judge imposed upon herself the duty to make a *prior* determination as to whether the *party suing* was liable in negligence! With the greatest respect, how could she have approached the case in this manner? Is it not the *plaintiff* who was suing the defendant for negligence, and not the other way round? In fact, there was no counterclaim by the defendant.

With respect, the learned sessions court judge was fundamentally wrong in her approach. The case she was dealing with — a normal road accident case — essentially concerns the tort of negligence. The proper manner of approaching the case, as with all cases of similar nature, was for the court to evaluate the whole evidence and to make a finding of mixed law and fact (after applying the principles governing the law of negligence to the facts of the case — among which was whether there was a breach of a legal duty to take care by the defendant) as to whether or not the *defendant* was liable in negligence. If the court were to find that the defendant was not guilty of negligence, then it must dismiss the plaintiff's claim. And in view of the fact that in the present case there was no counterclaim by the defendant against the plaintiff for negligence, that would be the end of the matter! But if, on the other hand, she were to come to a finding that the defendant was liable in negligence, then since in the present case the defendant, in his pleading, has pleaded *contributory* negligence, she must also consider and make a finding of mixed law and fact (after applying the principles governing contributory negligence to the facts of the case) whether or not the plaintiff was guilty of *contributory* negligence. And assuming that she were to find the plaintiff guilty of contributory negligence, then the damages recoverable by the plaintiff are to be reduced to such extent as the court thinks just and equitable having regard to the plaintiff's share in the responsibility for the damage.

In considering whether or not the plaintiff was guilty of contributory negligence, the sessions court judge must apply the principle laid down by the Federal Court in *Kek Kee Leng v Teresa Bong Nguk Chin & Anor* [1978] 1 MLJ 61 where at p 63 the court held:

> Contributory negligence is an expression meaning 'negligence materially contributing to the injury' (see Lord Porter in *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at p 186), the word 'contributory' being regarded 'as expressing something which is a direct cause of the accident' (see judgment of Lord Maugham in *R v Southern Canada Power Co* [1973] 3 All ER 923 at p 930). However, the word 'negligence' is not used in its usual meaning. Negligence ordinarily means breach of a legal duty to take care, but as used in the expression 'contributory negligence' it does not mean breach of duty. It means the failure by a person to use reasonable care for the safety of himself or his property so that he becomes the author of his own wrong. More recently, Lord Simon in giving the judgment of the Privy Council in *Nance v British Columbia Electric Ry* [1951] AC 601 said at p 611:
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> > 'When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by his want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.'
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> In short, the question in this case depends entirely on whether the plaintiff could reasonably have avoided the consequences of the second defendant's negligence having regard to the specific findings of the learned judge.

Now, this appeal is by the defendant. He is appealing against both liability and the quantum of damages awarded. The appellant contended that he was not liable in negligence.

On the day of the accident, the defendant was driving his car from Alor Setar heading for Jitra. The plaintiff, a motor cyclist, was from the opposite direction. He was from the direction of Jitra and was heading for Alor Setar. The collision between their vehicles took place somewhere near Anak Bukit.

The accident took place around 3.30pm. At that time, it was drizzling and the road was wet.

The damage to the defendant's car was on the front side — but more to the front off-side as shown by the fact that (besides the damage to the radiator tank and the front grill) the front off-side headlamp was broken, the front off-side mudguard dented and the middle and off-side parts of the front bumper dented.

Likewise, the damage to the plaintiff's motorcycle was also on the front part of the motorcycle.

As is normal in such cases as this, both sides, in evidence, gave conflicting versions as to how the accident occurred. Each blamed the other.

A According to the plaintiff, he was riding on his side of the road at a speed of about 60km/hour when the defendant's oncoming car overtook another car and in so doing encroached into his (plaintiff's) side of the lane. He alleged that when the defendant's car started to encroach, it was about 50 feet away from his motor cycle.

B According to the defendant, he was driving — also at the speed of 60km/hour — on his side of the road when the plaintiff's motor cycle collided with his car. In examination-in-chief, he did not in so many words say that the motor cycle encroached into his side of the lane. But he said he tried to avoid the collision by applying his brakes and sounding his horn, but to no avail as the road was wet. Furthermore, he was taken by surprise ('saya C terkejut ...'). He denied overtaking any car or encroaching into the plaintiff's lane. He said that he first saw the motor cycle when it was about 100m away. In cross-examination, however, he claimed that the plaintiff's motor cycle was on his (defendant's) side of the road before the collision occurred ('motosikal itu ada dalam "line" saya').

D As required by the Road Transport Act 1987, both the plaintiff and defendant lodged separate police reports. Their evidence was consistent with what they had stated in their respective reports. However, it is important to note that the defendant in his report did explain that the plaintiff's motor cycle skidded to his side of the road ('terus meluncur ke arah motokar saya').

E With respect, from the judgment of the learned sessions court judge, it is not clear to me as to how she came to the conclusion that *both* parties were 'equally responsible' for the accident. In her judgment, she appears to have avoided the real question: whose act caused the wrong? In other words, she had not dealt at all with the question of causation.

F In fact, the learned sessions court judge started on the wrong footing when she couched the issue for the court's determination in the following manner:

> Oleh yang demikian, perkara yang menjadi isu adalah: adakah *plaintif* yang makan jalan laluan *defendan* dan menyebabkan kemalangan ini atau sebaliknya.

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Since it is the *plaintiff* who is suing the defendant, and that it was the plaintiff's pleading (see para 4(f) of the statement of claim) that the defendant had encroached into his lane, and moreover, as the legal burden throughout was on the plaintiff, therefore the issue should have been couched the other way round as follows:

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> ... adakah *defendan* yang makan jalan laluan *plaintif* dan menyebabkan kemalangan ini atau sebaliknya.

The sessions court judge seems to have laid much emphasis on her finding of fact — with which, with respect, I disagree — that the accident occurred I 'near' the middle/dividing line. She said:

> Dari segi 'totality' keterangan plaintif sendiri dan defendan serta keterangan pegawai siasatan, rajah kasar P1, P1K dan kerosakan kenderaan terlibat,

mahkamah dapati kemalangan ini berlaku dekat garisan putih di tengah-tengah jalan. A

Thereafter, two sentences away, the learned sessions court judge, rather quite abruptly, came to the conclusion:

Secara simpulan atas isu liabiliti mahkamah dapati kedua plaintif dan defendan harus dipertanggungjawabkan sama rata atas kemalangan ini. B

With respect, I do not think that the above finding as to where the collision occurred is sufficient to support an inference (or a consequential finding) that the defendant (or, both defendant and plaintiff) is guilty of negligence. For one thing, on a careful reading of the first quoted passage, it will be observed that the learned sessions court judge did not say that the accident occurred 'atas garisan putih': she said it occurred '... dekat garisan putih'. 'Dekat' means 'near'. So it begs the question, how near to the center white line is 'dekat'? Six inches away from the center white line? One foot away from the white line? Two feet away? And on whose side of the white line did the collision take place? Was it on the plaintiff's side? Or was it on the defendant's side? These questions were not addressed by the sessions court. C D

Now, the learned sessions court judge also said in her judgment:

Sehubungan dengan ini mahkamah dapati P1, P1K juga menunjukkan bertaburan kaca di kedua-dua belah jalan dan lebih *sedikit* di atas jalan laluan defendan. (Emphasis added.) E

With respect, to say that the glass fragments or splinters were *slightly* more on the defendant's side is also a perverse finding of fact. The evidence, in particular, the sketch plan, clearly shows that the glass fragments or splinters were found scattered *very much more* on the defendant's lane as compared to the plaintiff's lane. This is also supported by the investigating officer (PW1) who, in evidence, said: F

Taburan (serpihan) kaca kebanyakan di antara 'B'–'C' dan sedikit antara 'A'–'B'.

In my judgment, since there are two conflicting versions, the court should adopt the test enunciated in *Lee Ewe Teik v Ariffin bin Hussain* [1990] 2 CLJ 191 and seek guidance from the silent evidence as disclosed in the sketch plan and key, photographs and the damage to the vehicles. G

Applying this principle, I examined the sketch plan and as I have just said, I observed — and I think this is very pertinent — that the glass splinters or fragments were found scattered very much more on the defendant's side of the road. There was very little glass splinters or fragments on the plaintiff's side. And the glass splinters or fragments were found not even near the middle/dividing line but more on the middle part of the defendant's lane. This being the case, I am unable to accept the plaintiff's contention that the accident occurred on his side of the road, or that the defendant had encroached into his lane. The position of the glass splinters or fragments shows that, on a balance of probabilities, the collision took place on the defendant's side of the road. H I

A Throughout, the burden was on the plaintiff to prove his case, that is to say, negligence on the part of the defendant, on a balance of probabilities. Upon considering the evidence in its totality, I found that the plaintiff had failed to discharge that burden.

It is a basic principle of law that an appellate court should be slow in
B disturbing a finding of fact by a lower court. But it is also the principle that an appellate court should reverse a finding of fact by the lower court if such finding is clearly against the weight of evidence.

Accordingly, I allowed the appeal on liability with costs (as well as costs for the proceedings at the lower court). The whole decision of the learned sessions court judge was set aside. In view of this finding on liability, I found
C it unnecessary to make any decision on the appeal as to quantum, as it would now be merely academic to do so.

Appeal on liability allowed with costs.

Reported by Mohd Rizal Abidin

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